John Joseph a/l Balendran v Supinah bt Abdul Hamid

HIGH COURT (IPOH) — CIVIL APPEAL NO AA-12B-51–11 OF 2017
MOHD RADZI JC
2 APRIL 2019

Evidence — Credibility — Discrepancies between police report and testimony — Appellant contended there was inconsistency of evidences given by respondent — Whether there was inconsistency between evidence of respondent and police report

Tort — Road accident — Liability — Appeal on liability — Sessions court decided 50% liability on appellant and respondent — Whether learned sessions court judge erred

An accident occurred on 17 April 2016 at about 1am between the appellant's motorcycle W6406T and the respondent's motorcar AEF6252 at KM16.5, Jalan Teluk Intan–Hutan Melintang. The appellant suffered multiple serious injuries mainly on his right arm and right leg. The respondent suffered minor injuries. The learned sessions court judge decided the liability to be equally shared at the rate of 50% for each of the parties and awarded an amount of RM126,000 in general damages and RM37,797 in special damages to the appellant. Both parties had different versions as to how the accident happened. The appellant's version was the accident occurred when the respondent's car encroached into his right of way. Whilst the respondent's version was totally the opposite, that the appellant's motorcycle encroached into her right of way and caused the collision. Learned counsel for the appellant contended that there existed a glaring inconsistency between the evidence of the respondent and her police report. The respondent gave evidence in court which formed her case against the appellant, that when she was travelling from Hutan Melintang towards Teluk Intan, the appellant's motorcycle from the opposite direction suddenly swerved into her lane and caused the accident. The appellant also appealed on the liability imposed by the sessions court.

Held, overturning the decision of the sessions court and altering the finding on liability:

(1) The respondent had corrected that portion of her statement in her police report and she had explained in her evidence that the appellant was in actual fact from her right and not from her left side when the accident occurred. The court concluded that the respondent's explanation was

credible and the respondent's version of accident merited consideration and further scrutiny. There were no inconsistencies (see paras 7–8).

(2) On the issue of liability, the court found that the learned session court judge had misdirected and the court must interfere. Where there were two versions of accident, the learned judge shall came to his decision upon making his own evaluation of the witnesses as to which was the most inherently probable or improbable and not make a finding to favour either one of those two competing versions asserted by the parties. The court found that the nature and extent of the damage to the appellants and respondent's vehicles and the nature of the road which was the scene of the accident were consistent with the evidence of the investigating officer ('IO'). The court found that learned session court judge had erred in arriving at his conclusion that the appellant was 50% liable. He had not taken into consideration fully the evidential value of the evidence of the IO and the other available evidence and to make his own evaluation of the witnesses' evidence and the sole independent witness as to which was the most inherently probable or improbable and not made a finding to favour either one of those two competing versions asserted by the parties. The respondent shall be 100% liable (see paras 14–15, 19 & 22).

[Bahasa Malaysia summary

Satu kemalangan telah berlaku pada 17 April 2016 lebih kurang pukul 1 pagi antara motorsikal W6406T perayu dan kereta AEF6252 responden di KM16.5, Jalan Teluk Intan–Hutan Melintang. Perayu mengalami pelbagai kecederaan serius terutamanya pada lengan tangan kanan dan kaki kanannya. Responden mengalami kecederaan ringan. Hakim mahkamah sesyen yang bijaksana memutuskan liabiliti dibahagikan sama rata pada 50% setiap pihak dan mengawardkan amaun RM126,000 sebagai ganti rugi am dan RM37,797 sebagai ganti rugi khas kepada perayu. Kedua-dua pihak mempunyai versi berbeza tentang bagaimana kemalangan itu berlaku. Versi perayu adalah bahawa kemalangan itu berlaku apabila kereta responden memasuki hak lalu lalangnya. Manakala versi responden adalah sebaliknya, bahawa motorsikal perayu telah memasuki hak lalu lalangnya dan menyebabkan perlanggaran itu. Peguam yang bijaksanan bagi perayu menegaskan bahawa terdapat keterangan yang jelas tidak konsisten antara responden dan laporan polisnya. Responden memberikan keterangan di mahkamah yang merupakan kesnya terhadap perayu, yang mana apabila dia sedang dalam perjalanan dari Hutan Melintang kearah Teluk Intan, motorsikal perayu dari arah bertentangan tiba-tiba melencong ke jalannya dan menyebabkan kemalangan. Perayu juga membuat rayuan tentang liabiliti yang dikenakan oleh mahkamah sesyen.

Diputuskan, mengakas keputusan mahkamah seysn dan mengubah dapatan berhubung liabiliti:

(1) Responden telah membetulkan bahagian kenyataannya dalam laporan

polisnya dan dia menjelaskan dalam keterangannya bahawa perayu sebenarnya berada di sebelah kanannya dan bukan dari sebelah kirirnya apabila kemalangan itu berlaku. Mahkamah memutuskan bahawa penjelasan responden boleh dipercayai dan versi responden tentang kemalangan itu mewajarkan pertimbangan dan penelitian selanjutnya. Tidak ada apa-apa yang tidak konsisten (lihat perenggan 7–8).

(2) Berhubung isu liabiliti, mahkamah mendapati hakim mahkamah sesyen yang bijaksana telah salah arah dan mahkamah mesti campur tangan. Di mana terdapat dua versi tentang kemalangan itu, hakim yang bijaksana hendaklah membuat keputusannya setelah membuat penilaiannya sendiri tentang saksi-saksi yang mana paling berkebarangkalian atau tidak berkebarangkalian dan tidak membuat dapatan yang menyebelahi salah satu daripada dua versi yang dihujahkan oleh pihak-pihak. Mahkamah mendapati keadaan dan tahap kerosakan kenderaan perayu dan responden dan keadaan jalan raya yang merupakan tempat kemalangan berlaku adalah konsisten dengan keterangan pegawai penyiasat ('IO'). Mahkamah mendapati bahawa hakim mahkamah sesyen yang bijaksana telah terkhilaf apabila membuat kesimpulan bahawa perayu adalah 50% bertanggungjawab. Beliau tidak mempertimbangkan keseluruhan nilai bukti keterangan IO dan keterangan lain yang tersedia dan untuk membuat penilaian beliau sendiri berhubung keterangan saksi-saksi dan satu-satunya saksi bebas tentang yang mana paling berkebarangkian atau tidak berkebarangkalian dan tidak membuat dapatan untuk menyebelahi salah satu daripada dua versi yang dihujahkan oleh pihak-pihak. Responden hendaklah 100% bertanggungjawab (lihat perenggan 14–15, 19 & 22).]

Notes

For a case on discrepancies between police report and testimony, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 1407.

For cases on liability, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2390–2392.

Cases referred to

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (folld)

Clarke v Edinburgh and District Tramways Co [1919] SC 35, HL (refd)

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] CLJ Rep 101, FC (refd)

Eng Thye Plantations Bhd v Lim Heng Hock & Ors [2001] 4 MLJ 26; [2001] 4 CLJ 245, CA (folld)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Jennifer Anne Harper (sued in her own capacity and as executrix of the estate of Bernard Alfred Harper, deceased) v Timothy Theseira [2009] 7 MLJ 711; [2009] 2 CLJ 499, HC (folld)
Koay Teik Choo & Ors v Reg [1956] 1 MLJ 52 (refd)
Muniandy & Ors v PP [1966] 1 MLJ 257; [1966] 1 LNS 110, FC (refd)
Noorianti bte Zainol Abidin & Ors v Tang Lei Nge [1990] 2 MLJ 242, HC (refd)
PP v Neoh Wan Kee [1985] 1 MLJ 368; [1984] 1 LNS 135 (refd)
Yahaya bin Mohamad v Chin Tuan Nam [1975] 2 MLJ 117, PC (refd)

Surendran a/l Suppiah (Nurul Syahirah Azman with him) (Surendran & Thiru) for the appellant.
Subashini a/p Gunasegran (Baljeet Kaur a/p Harbhajan Singh with her) (VT Singam, D Gunasegran & Co) for the respondent.

Mohd Radzi JC:

BACKGROUND

[1] An accident occurred on 17 April 2016 at about 1am between the appellant's motorcycle W6406T and the respondent's motorcar AEF 6252 at KM16.5, Jalan Teluk Intan–Hutan Melintang. The appellant suffered multiple serious injuries mainly on his right arm and right leg. The respondent suffered minor injuries. The learned sessions court judge ('HMS') decided the liability to be equally shared at the rate of 50% each for the parties, and awarded an amount of RM126,000 in general damages and RM37,797 in special damages to the appellant.

[2] On the appellant's appeal, only on the issue of liability, this court decided to overturn the finding of the HMS on liability and held that the respondent shall be 100% liable.

[3] Aggrieved by my findings, the respondent filed this appeal. Below are my grounds in coming to such decision.

FACTS

[4] Both agreed that the accident happened on the date and time involving their respective vehicles as mentioned earlier. They also agreed on the description of the route taken by each of them at the time and on the date of the accident, that is the appellant was travelling from Teluk Intan to Hutan Melintang, and the respondent was travelling on the opposite direction from Hutan Melintang to Teluk Intan.

[5] Both have differing versions as to how the accident happened. The

appellant's version was the accident occurred when the respondent's car encroached into his right of way. Whilst the respondent's version was totally the opposite, that the appellant's motorcycle encroached into her right of way and caused the collision.

(Refer to exhs P1 and P1K for the sketch plan and key to the sketch plan as drawn by the investigating officer ('IO')).

FINDING

[6] At the outset, I wish to address the issue raised by learned counsel for the appellant during his submission that there exist a glaring inconsistency between the evidence of the respondent and her police report (exh D4). The respondent gave evidence in court, which formed her case against the appellant, that when she was travelling from Hutan Melintang towards Teluk Intan, the appellant's motorcycle from the opposite direction suddenly swerved into her lane and caused the accident. When I viewed northward the sketch plan (exh P1) prepared by SP2, the IO, it was clear to me that the appellant was on the right side of the road, and the respondent was on the left side of the road. I noticed that in her police report (exh D4), the respondent stated that the appellant's motorcycle appeared from her left side and suddenly encroached into her side.

[7] I had compared that fact with the respondent's evidence in the notes of evidence. The respondent had corrected that portion of her statement in her police report and she had explained in her evidence that the appellant was in actual fact from her right and not from her left side when the accident occurred. She further explained that as that was her first ever experience of a road accident, she was in a state of confusion and panic, and she was still traumatic when she lodged her report and gave her statement to the IO. This resulted in the mistake in her police report in exh D4.

[8] This court concludes that the respondent's explanation was credible and the respondent's version of accident merits consideration and further scrutiny. There were no inconsistencies.

[9] I shall now address the main issue in this appeal on the finding of the HMS relating to the liability of the parties.

[10] It is trite that this court shall be slow in disturbing the finding of the HMS. I am guided by the long-standing principle on the role of an appellate judge laid down by the oft-quoted decision of the House of Lords in *Clarke v Edinburgh and District Tramways Co* [1919] SC 35 (HL), as spoken so succinctly by Lord Dunfermline as follows:

A When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case, things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question: am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[11] That principle had been affirmed and followed in many subsequent decisions including the Federal Court in *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163 when it said:

> It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the findings of the court below should be disturbed by a court of appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy *(Crofter Harris Tweed Co v Veitch)* [1942] 1 All ER 142 HL per Lord Porter at p 167.

[12] This principle is not without its qualification. If the appellate court found that the trial judge had been plainly wrong or unjust, such as fundamentally misdirected itself, then the appellate court must intervene and correct that wrong and restore justice. This was explained by Gopal Sri Ram JCA (as he then was) in *Eng Thye Plantations Bhd v Lim Heng Hock & Ors* [2001] 4 MLJ 26; [2001] 4 CLJ 245 when His Lordship delivered the decision of the Court of Appeal in the following words:

> But like all principles of law there are qualifications to this one as well. It would be an abdication of an appellate court's proper responsibility if it did not intervene and set right decisions of trial courts that are plainly wrong or unjust. I do not think that an exhaustive list of cases in which an appellate court may intervene can be set out. What is to be discerned is the principles upon which an appellate court acts. These

are to be found in the joint judgment of my learned brother Shankar JCA and myself in *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395. That was also a case of a failure on the part of the trial judge to undertake a judicial appreciation of the evidence. This is what we there said (at p 398):

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[13] Balia Yusof J (as he then was) had also applied the above decision with affirmation in *Jennifer Anne Harper (sued in her own capacity and as executrix of the estate of Bernard Alfred Harper, deceased) v Timothy Theseira* [2009] 7 MLJ 711; [2009] 2 CLJ 499, where His Lordship held:

> On the issue of liability, I appreciate that this appeal is basically against the finding of facts made by the learned sessions court judge. As such the court would always be slow and reluctant to disturb such finding of facts unless it can be shown that such finding could not be sustained by having regard to the evidence made available before the trial judge ... Appellate courts do not make finding of facts but merely review the finding of primary facts made by the trial judge (see *Eng Thye Plantation Bhd v Lim Heng Hock & Ors* [2001] 4 MLJ 26; [2001] 4 CLJ 245, *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545) (CA)).

[14] Applying the authorities above and upon considering the grounds of judgement of the HMS, this court found that HMS had misdirected himself and this court must interfere.

[15] Where there are two versions of accident before the HMS, as in the instant case, the HMS shall come to his decision upon making his own evaluation of the witnesses' evidence and other independent witnesses as to which is the most inherently probable or improbable, and not make a finding to favour either one of those two competing versions asserted by the parties. See: *Koay Teik Choo & Ors v Reg* [1956] 1 MLJ 52, *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257; [1966] 1 LNS 110, *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ Rep 101, and *Public Prosecutor v Neoh Wan Kee* [1985] 1 MLJ 368; [1984] 1 LNS 135.

[16] Lim Beng Choon J in *Noorianti bte Zainol Abidin & Ors v Tang Lei Nge* [1990] 2 MLJ 242 explained the correct manner to be adopted by a trial judge when faced with two conflicting stories as follows:

> It is useful to pause here for a moment to say a few words regarding the approach which a trial Judge should adopt in evaluating the evidence adduced at a trial. It has been stated in numerous cases that the fact that the evidence given by the witnesses

of one party was unshaken or unbroken is not per se an all sufficient acid test of credibility and that the inherent probability or improbability of the fact in issue must be the prime consideration — see for instance *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257, *Dato Mokhtar bin Hashim v Public Prosecutor* [1983] CLJ Rep 101 and *Public Prosecutor v Neoh Wan Kee* [1985] 1 MLJ 368 at p 372. It has also been said that a trial Judge should not approach the case upon the basis of deciding which of the two conflicting stories he should believe but rather on the basis of considering which version is inherently probable or improbable — see for instance *Koay Teik Choo & Ors v Reg* [1956] 1 MLJ 52. With these principles in mind I shall now assess the evidence in the present case.

[17] Aside from applying his mind to the version that was inherently probable or improbable, the HMS must consider the finding of the IO, and take into consideration the photographs, the sketch plan drawn by the IO and the extent and nature of damage occurred on the vehicles involved. This is in line with the principle laid down by Syed Agil Barakbah in *Yahaya bin Mohamad v Chin Tuan Nam*, which was reversed by the Federal Court but subsequently restored and affirmed by the Privy Council, as reported in *Yahaya bin Mohamad v Chin Tuan Nam* [1975] 2 MLJ 117. The relevant portion of Syed Agil Barakbah J's decision on this point was as follows:

Nevertheless, it is only proper to examine the other evidence available considering the conflicting stories given on either side, before making any definite conclusion. The test applicable, is as approved by the Court of Appeal in *San Seong Chay & Ors v Yuson Bien* [1963] 1 MLJ 235 namely, where the parties on either side tell conflicting stories, the photographs, plans and measurements of the scene and the nature of the damage to each vehicle provide the most reliable guide by which such evidence can be tested.

[18] This court finds the IO in his evidence informed the trial judge twice that based on his investigation, it was most probably that the respondent's vehicle had encroached into the appellant's right of way. This was based on the extent and nature of damage seen on the appellant's motorcycle which were only on the right side of that motorcycle.

[19] Having referred to the photographs (exhs P2(A–L)) and the sketch plan and the key to the sketch plan drawn by the IO (exhs P1 and P1K), it is the finding of this court that the nature and extent of the damage to the appellant's and respondent's vehicles, and the nature of the road which was the scene of the accident, were consistent with the evidence of the IO. The IO's conclusion based on his investigation that the respondent could probably had encroached into the appellant's lane was also consistent with the extent of injuries suffered by the appellant, which had been supported by an independent medical report issued by the Hospital Teluk Intan (exh P8), the plaintiff's specialist medical reports (exhs P9 and P10) and the defendant's specialist medical report (exh P11).

[20] This court took judicial notice that when a driver, in a similar position as the respondent, is approaching the right curve of the road as shown in the top (northern) part of exh P1, it is probably likely that that driver would swerve slightly to the right side of the road to avoid the vehicle from leaning leftward. At such instance, if the driver is not in full control of the vehicle, it could probably lead to the vehicle encroaching into the opposite right of way.

[21] From the evidence of the IO, SP1, it was also revealed that the impact of the accident between the appellant and the respondent had caused the appellant's motorcycle to glide downward towards Hutan Melintang (using the direction in the sketch plan, exh P1), and had resulted in a second impact with another vehicle, motorcar No BFL 5549 ('third vehicle'). The driver of this third vehicle was not called to give evidence during this trial. Neither was his statements and police report used by the IO for purposes of this current case. Therefore, in light of the absence of any evidence from other independent witness, this court finds that the HMS must heavily rely on the evidence of the sole independent witness, the IO, SP1 and draw her conclusions on the most probable cause of the accident mainly upon assessing SP1's evidence and the other 'silent evidence'. This, in the finding of this court, the HMS had failed to do. He had brushed aside SP1's evidence. That failure by the learned HMS tantamount to what was termed by the Court of Appeal and affirmed by the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 as 'insufficient judicial appreciation of evidence'. In that case, the Federal Court ruled although it is trite that an appellate court shall not disturb the finding of the trial judge, unless it merits intervention due to manifest error by that trial judge, an appellate court is entitled to examine the process of evaluation of evidence by the trial judge to determine the existence of that manifest error. The Federal Court held as follows:

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

A CONCLUSION

[22] This court found that the learned HMS had erred in arriving at his conclusion that the appellant was 50% liable. He had not taken into consideration fully the evidential value of the evidence of the IO and the other
B available evidence and to make his own evaluation of the witnesses' evidence and the sole independent witness as to which is the most inherently probable or improbable, and not make a finding to favour either one of those two competing versions asserted by the parties.

C **[23]** Based on all the above, this court reversed and altered the learned HMS's finding on liability of the appellant. This court finds the respondent was 100% liable in causing the accident on that unfortunate date.

D *Decision of the sessions court overturned and finding on liability of the appellant altered.*

Reported by Mohd Kamarul Anwar

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